

FILED

02 JUL 12 PM 4:10
U.S. COURT
N.D. ALABAMA

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division**

-----X)	
In re:)	Case No.: 02-02771-BGC-11
SHOOK & FLETCHER INSULATION CO.,)	
Debtor-in-Possession.)	Chapter 11
-----X)	

**MOTION BY TRAVELERS CASUALTY & SURETY COMPANY
TO COMPEL DISCOVERY**

Travelers Casualty & Surety Company ("Travelers"), by and through its undersigned counsel, respectfully submits this motion, pursuant to Fed. R. Civ. P. 37, made applicable by Fed. R. Bankr. 7037, seeking an Order compelling Shook and its counsel to fully and completely produce (i) all contingency fee agreements that either Scott D. Gilbert ("Mr. Gilbert") or Gilbert, Heintz & Randolph ("GHR") has made in other cases in which the asbestos nonproducts coverage issue is presented; (ii) records of all payments made by Shook to Mr. Gilbert's law firm; (iii) all coverage analyses of GHR regarding Shook and related documentation, and all communications between GHR and Shook regarding the issues on which Shook has asked Mr. Gilbert to testify; and (iv) all data that Mr. Gilbert has consulted or will consult in formulating his expert opinion. The grounds for this motion are set out below.¹

BACKGROUND

The Debtor, Shook & Fletcher Insulation Co. ("Shook") has proffered Mr. Gilbert as its expert on, among other things, Shook's likelihood of success against Travelers in the

¹ On July 10, 2002, Travelers' counsel asked Shook's counsel to meet and confer with respect to this matter, explaining that in light of the schedule in this bankruptcy proceeding that we would be required to file this motion on July 12, 2002. No response was received.

insurance coverage dispute relating to the bankruptcy proceeding that is before this Court.² Mr. Gilbert's testimony in this matter is, to put it mildly, suspect. It is difficult to imagine an "expert" having more business and financial ties to Shook than Mr. Gilbert has. It is even more difficult to imagine an "expert" who stands to gain as much financially as Mr. Gilbert does if his "expert opinions" are given credence by this or any other Court. Finally, it is difficult to imagine a situation more appropriate for compelling production of a lawyer's work product and other privileged communications than this one, where the lawyer and his client voluntarily place the credibility and integrity of the lawyer's opinions at issue by intending to present and rely upon those opinions as "expert" testimony at the upcoming hearings.

Mr. Gilbert is a name partner in and one of the founders of the law firm of GHR. GHR currently represents Shook in these bankruptcy proceedings and in the insurance coverage dispute. *See* Transcript of Deposition of Scott D. Gilbert ("Gilbert Dep."), attached as Exhibit A, at 17. Mr. Gilbert's law firm has a contingency fee agreement with Shook which stipulates that GHR will receive 15 percent of any insurance proceeds that Shook recovers from Travelers in the parties' insurance coverage dispute. *See id.* at 66-68. According to Mr. Gilbert, his law firm

² Even though it is moving to compel the production of certain categories of documents, Travelers also intends to move to exclude Mr. Gilbert's testimony. Mr. Gilbert's expert opinion consists entirely of judgments about the legal implications of Travelers' conduct. An expert witness, however, may not testify as to the legal implications of conduct; "the court must be the . . . only source of law." *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) (applying Florida law) (citing Fed. R. Evid. 704) (holding that in an insured's action against his fiduciary responsibility insurer, expert testimony that the insurer had a duty to hire tax counsel for its insured was a legal conclusion which should not have been admitted by the district court); *see also KW Plastics v. U.S. Can Co.*, 199 F.R.D. 687, 695 (M.D. Ala. 2000) (holding that an expert would not be allowed to testify as to the legal effects of a merger between two companies); *Strickland v. Royal Lubricant Co., Inc.*, 911 F. Supp. 1460, 1469 (M.D. Ala. 1995) (holding that an expert's opinion that the absence of an instruction to wear a respirator renders a warning "inadequate" as that term is defined under Alabama law would not be admissible because it would constitute an attempt to instruct on the application of the law concerning a failure-to-warn claim and the legal implications of the defendant's conduct); *Carrier Express, Inc. v. Home Indem. Co.*, 860 F. Supp. 1465, 1476 (N.D. Ala. 1994) (holding that an expert's testimony in the form of "a dissertation of the law as it related to this case" was properly excluded because "[d]ecisions regarding questions of applicable law are the province of the court."). This motion to compel is necessary, however, because Travelers must prepare to respond to Mr. Gilbert's testimony in the event it is permitted.

will have no obligation to share any contingency fee it does recover from Travelers with anybody else. *See id.* at 77. Further, Mr. Gilbert's law firm *also* is receiving a flat fee of \$1 million from Shook for the negotiation of the prepackaged bankruptcy plan that currently is before this Court. *See id.* at 74-75.

Mr. Gilbert's law firm's ties with Shook are not limited to the current proceedings. It has represented Shook since January 2001, when GHR first was formed. *See* Gilbert Dep. at 38-39. During that time, Shook presumably has paid Mr. Gilbert's law firm thousands (and possibly hundreds of thousands) of dollars in fees for legal services rendered. *See id.* at 39-40. Moreover, prior to January 2001, Mr. Gilbert was a partner at the law firm of Dickstein Shapiro Morin & Oshinsky LLP ("DSMO"). While there, Mr. Gilbert testified that he and Richard Shore provided services to Shook in connection with Shook's insurance coverage claims. *See id.* at 41. Mr. Shore, who also is representing Shook in these proceedings, is one of Mr. Gilbert's partners at GHR. *See id.* at 17. He also is one of the persons who first approached Mr. Gilbert about serving as an "expert witness" in this dispute. Indeed, as Mr. Gilbert admitted, Mr. Shore even "had input" into Mr. Gilbert's "expert report." *See id.* at 19.

Obviously, Mr. Gilbert, Mr. Shore and their law firm will make a lot of money if their longtime client Shook is successful in its coverage dispute with Travelers. Thus, it is not surprising that Mr. Gilbert concludes in his expert report that Travelers is responsible for the "full amount" of Shook's claims against it. Perhaps less obvious at first glance are the *additional* benefits that would accrue to Mr. Gilbert and his law firm in several of their other pending asbestos-related cases involving nonproducts issues if they are successful in their efforts here:

- Mr. Gilbert's law firm currently acts as co-counsel with the law firm of Weitz and Luxembourg in pursuing claims against the Robert Keasbey Company in New York. *See* Gilbert Dep. at 78. There, his firm helps with advising and

representing claimants in asbestos coverage litigation with respect to the application of insurance policies to asbestos bodily injury claims. *See id.* at 79.

- Mr. Gilbert's law firm also represents the Celotex Trust in an asbestos-related matter pursuant to an agreement that has a contingency element "that can be triggered up to the happening of certain events." *See id.* at 83-84.
- Mr. Gilbert's firm also currently is working with the plaintiffs' asbestos bar on the development of at least three other prepackaged bankruptcies that are similar to the Shook matter. *See id.* at 87-89.

These matters involve the same nonproducts issues that are presented in the underlying coverage dispute between Shook and Travelers. *See id.* at 80; 89. Thus, a favorable decision in these proceedings on the nonproducts issue will directly benefit Mr. Gilbert and his firm because it will serve as precedent for them in these other matters. Or, as Mr. Gilbert stated, "would a positive outcome in Shook benefit our efforts there in any other case or any other policyholder, sure." *Id.* at 80-81.

The contingency fee agreements that Mr. Gilbert's law firm has with its clients in these other nonproducts cases provide further financial incentive for Mr. Gilbert to testify in the manner that he has here, and Travelers accordingly has sought discovery of their terms. Notwithstanding the fact that these contingency fee agreements go directly to the degree of additional bias that can be imputed to Mr. Gilbert's testimony, he refused to divulge their terms at his deposition on July 3, 2002. Instead, he would only state that the terms of the Keasbey Company fee agreement were "confidential." *See id.* at 81. With regard to the Celotex Trust matter, Mr. Gilbert would only testify that the contingency fee agreement there was "something I'm not comfortable disclosing without the consent of the trustees." *See id.* at 84-85. Since Mr. Gilbert will not disclose this information that goes directly to his financial stake in this litigation and to his motives to testify, Travelers now moves to compel its production.

The contingency fee agreements are not the only things that Travelers is entitled to review but which Mr. Gilbert has not yet produced. At Mr. Gilbert's deposition on July 3, 2002, Travelers requested that Mr. Gilbert, his law firm, or Shook produce various categories of information directly relevant to the credibility and integrity of the opinions, which his client is voluntarily injecting into and relying on in this case. To date, none have been produced. The list includes:

- A list and copy of all publications Mr. Gilbert authored in the past ten years. *See* Gilbert Dep. at 6-7.
- A written list of all cases in which Mr. Gilbert has testified either by trial or by deposition in the last four years. *See id.* at 7. Moreover, Mr. Gilbert has not provided transcripts of his trial or deposition testimony and any reports he submitted in each of these proceedings. *See id.* at 8-15.
- Drafts of Mr. Gilbert's expert report or any edits he made to that report. *See id.* at 20.
- The amount of fees received by GHR for its representation of Shook, pursuant to the January 29, 2001 engagement letter with Shook or otherwise. *See id.* at 39-40; 64-65.
- The information regarding GHR's fee for representing the claimants in the Kentile matter. *See id.* at 86-87. Mr. Gilbert testified that he did not remember whether his law firm's fee was a contingency fee. *See id.* at 87. If it is, then Travelers needs to know the terms of this fee.
- Any and all data that Mr. Gilbert has reviewed at any time, or that he plans to review in support of his opinions, "in the way of claim information and data and what people have looked at in terms of the potential exposure of Travelers vis-a-vis the Wellington triggers" (as he explained it). *Id.* at 103-105.
- All projections that Mr. Gilbert has reviewed at any time, or that he plans to review in support of his opinions, showing the alleged likely exposure demographics for future claimants against Shook. *See id.* at 106-108; 116-117.
- Any and all analyses of Shook's operations or its past asbestos claims that Mr. Gilbert has reviewed at any time, or that he intends to review in connection with his opinions that a substantial percentage of the claims against Shook are "nonproducts" claims, including all internal GHR or DSMO memoranda that describe, discuss, or relate to those studies. *See id.* at 150-152.

- All interview notes or internal memoranda created by GHR or any other Shook attorney that Mr. Gilbert has reviewed at any time, or that he plans to review in support of his opinions, with respect to the Schedule D “date” issue. *See id.* at 163-164.
- A transcript of Mr. Gilbert’s testimony in Dow Corning on the *UNR* issue. *See id.* at 195-196.
- Any and all documents detailing or describing any discussions or information provided to Mr. Gilbert by Shook or its officers either directly or indirectly relating to the issue of “nonproducts” insurance coverage, the Schedule D “date” issue, or Section XX. *See id.* at 219-20.
- The undated report identified as item 12 on the GHR privilege log, described as containing an analysis by GHR of Shook’s coverage. *See id.* at 221-222.

For the reasons that follow, Travelers is entitled to the production of each and every one of these items.

GROUND FOR RELIEF

(1) Shook must produce the other contingency fee agreements and the other documents proving the full amount of Mr. Gilbert’s financial interest in this proceeding.

Proof of bias, that is, any evidence of a relationship, circumstance or motivation which might lead a witness to slant, unconsciously or otherwise, his testimony, is “almost always relevant.” *United States v. Abel*, 469 U.S. 45, 52 (1984); *United States v. Cravero*, 545 F.2d 406, 419 (5th Cir. 1977) (“Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility.”). A witness like Mr. Gilbert may be impeached by showing that he is biased, has an interest in the outcome of the litigation, is prejudiced in some relevant way, or has a motive to testify in a particular way. *See Abel*, 469 U.S. at 49-52 (permitting bias impeachment); *see also Behler v. Hanlon*, 199 F.R.D. 553, 555-56 (D. Md. 2001) (“[A] witness always may be impeached by evidence that she or he is biased, prejudiced, has a financial interest in the outcome of the case, or a motive to testify in a particular manner.” (emphasis added)).

Courts generally are “liberal” in admitting evidence of bias because it is important evidence “of the underlying relationships, circumstances, and influences operating on the witness” that is useful in determining “whether a modification of testimony reasonably could be expected as a probable human reaction.” *Koch v. Koch Industries, Inc.*, 2 F. Supp. 2d 1385, 1389 (D. Kan. 1998) (quoting 4 Jack B. Weinstein & Margaret A Berger, *Weinstein’s Federal Evidence* § 607.04[1] (2d ed. 1997)), *aff’d in part, rev’d in part*, 203 F.3d 1202 (10th Cir. 2000). In this regard, courts have held that examples of relationships or circumstances that permit a finding of bias or prejudice are nearly limitless, and include:

love, hate, fear, family relationship, sexual preference, financial interest in outcome, business relationship, membership in an organization, shared beliefs, payment by a party such as that made to an expert witness, and in criminal matters the fact that the witness has not been charged with a crime, been granted immunity or is currently awaiting sentence.

1 Michael Graham, Handbook of Federal Evidence, § 607.7 (4th ed. 1996) (emphasis added); *see also Behler*, 199 F.R.D. at 557 (the fact that an expert witness had a 20 year history of earning income testifying primarily as a witness for insurance company defendants and had an ongoing economic relationship with certain insurance companies “certainly” fit within recognized examples of bias/prejudice impeachment, and the percentage of the expert’s gross income attributable to performing expert witness services for these companies was “squarely within the scope of discovery authorized by Rule 26(b)(1)”).

Evidence illustrating the precise extent of Mr. Gilbert’s financial involvement in the outcome of this litigation is obviously relevant. Moreover, evidence of similarly large contingency fee agreements with other clients in similar matters would make the facts to which Mr. Gilbert testified even “less probable” than they would be otherwise. *Abel*, 469 U.S. at 51. While Travelers knows that Mr. Gilbert and his law firm have an interest in this litigation to the

tune of tens of millions of dollars, Travelers does not yet know precisely how many millions of dollars Mr. Gilbert might win if his efforts at “expert testimony” are rewarded here. In other words, Travelers already knows that Mr. Gilbert has a motive to testify as he has done. Travelers is now trying to find out, and the Court is entitled to hear, just how significant that motive is.

For these same reasons, Mr. Gilbert, his firm, and/or Shook must produce documents showing the amount of fees received by GHR for its representation of Shook, pursuant to the January 29, 2001 engagement letter with Shook or otherwise. *See id.* at 39-40; 64-65. Mr. Gilbert also has not produced information relating to his fee for representing the claimants in Kentile, which is another asbestos nonproducts matter. *See id.* at 86-87. If Mr. Gilbert’s firm does have a contingency fee agreement with the claimants in Kentile, then Travelers and the Court need to know the details of that agreement. *See id.* at 87.

(2) Shook must produce all coverage analyses by GHR regarding Shook, and all internal communications between GHR and Shook, on the coverage issues that are the subject of Mr. Gilbert’s opinions.

Since Shook has proffered Mr. Gilbert as its “expert” on Travelers’ legal obligations under the relevant agreements, it must produce all coverage analyses by GHR regarding Shook, and all internal communications between GHR and Shook, on the coverage issues that are the subject of Mr. Gilbert’s opinions. In this regard, many courts have held that the requirements of Rule 26 trump any “work product” protections that communications between an expert and counsel for the proffering party might otherwise claim. *See, e.g., TV-3, Inc. v. Royal Ins. Co. of America*, 193 F.R.D. 490, 491-92 (S.D. Miss.) (adopting the approach “that Rule 26, requiring disclosure of material ‘considered,’ allows discovery of all communications between counsel and a retained testifying expert, even if those communications contain the attorneys’ mental impressions or trial strategy or [are] otherwise protected by the work product

privilege.”); *see also Musselman v. Phillips*, 176 F.R.D. 194, 202 (D. Md. 1997) (“[W]hen an attorney furnishes work product--either factual or containing the attorney’s impressions--to [a testifying expert witness], an opposing party is entitled to discover such a communication.”); *B.C.F. Oil Refining v. Consol. Edison Co. of N.Y.*, 171 F.R.D. 57, 62-67 (S.D.N.Y. 1997) (holding that all material considered by a testifying expert, including communications from counsel containing attorney work product, must be disclosed); *Karn v. Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (the expert disclosure requirements of 26(a)(2) “‘trump’ any assertion of work product or privilege”); *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 304-06 (W.D. Va. 1998) (same); *Furniture World, Inc. v. D.A.V. Thrift Stores*, 168 F.R.D. 61, 62 (D.N.M. 1996) (same); *Culbertson v. Shelter Mut. Ins. Co.*, No. 97- 1609, 1999 WL 109566, at *1 (E.D. La. Mar. 2, 1999) (same); *Johnson v. Gmeinder*, 191 F.R.D. 638, 644-47 (D. Kan. 2000) (same); *Barna v. United States*, No. 95 C 6552, 1997 WL 417847, at *2-*4 (N.D. Ill. July 28, 1997) (same); *Baxter Diagnostics, Inc. v. AVL Scientific Corp.*, No. CV91-4178-RG, 1993 WL 360674, at *1 (C.D. Cal., Aug. 6, 1993) (citing the amendments to Rule 26(a)(2) as requiring “automatic disclosure of all information considered by trial experts” in forming their opinions).

In this case, the coverage analyses and other communications and information generated by GHR for Shook, on the issues on which Mr. Gilbert will opine, must be produced. These analyses, communications and information have been provided to Mr. Gilbert in the same way that such analyses are provided by counsel to traditional, independent experts. In fact, because Mr. Gilbert’s opinions of Shook’s coverage rights have been formed over the years from his and his firm’s representation of Shook on these issues, such analyses are even more appropriate for discovery. They necessarily are part of the fabric of Mr. Gilbert’s thinking on Shook’s nonproducts coverage. Obviously, any statements in those analyses or communications

that are inconsistent with or undercut Mr. Gilbert's opinions here are critical to an effective cross examination of Mr. Gilbert.

As the privilege has been waived voluntarily by GHR's and Shook's decision to place in issue Mr. Gilbert's coverage analysis for Shook, Shook must produce all coverage analyses by GHR regarding Shook, and all internal communications between GHR and Shook, on the coverage issues that are the subject of Mr. Gilbert's opinions

(3) Shook must produce all data considered by Mr. Gilbert in reaching his expert opinion.

Fed. R. Civ. P. 26(a)(2)(B) requires the disclosure of expert witnesses retained by a party and a "complete statement of all opinions to be expressed and the basis and reasons" for the expert's opinions. Pursuant to the plain language of this rule, Mr. Gilbert has to disclose all data he considered in reaching his expert opinion, as this data forms the "basis and reasons" for that opinion.³ *See, e.g., Chapple v. Alabama*, 174 F.R.D. 698, 699 (M.D. Ala. 1997) (noting Fed. R. Civ. P. 26(a)(2)(B) "is not intended as a make-work device but rather as [a] meaningful provision which eliminates 'unfair surprise to the opposing party and the [sic] conservation of resources' by providing notice of the specifics of the expert's expected testimony" (quotation omitted)). Furthermore, Alabama law is clear that Mr. Gilbert's disclosures must be full and complete in this regard.

In *Chapple*, for example, the plaintiff's expert witness filed an expert witness report with seven exhibits attached. The defendants moved to quash on the grounds that they could not tell from the report and its attachments what the expert's opinions were supposed to be.

³ Mr. Gilbert testified that he based his expert opinions in part on representations made to him by his partner Mr. Shore. *See, e.g.,* Gilbert Dep. at 103 ("[My opinion is] based upon Mr. Shore's representations to me of what he's seen from the CCR in the way of claim information and data and what people have looked at in terms of potential exposure of Travelers vis a vis the Wellington triggers."); 104 (" . . . I will find out from Mr. Shore what's

See id. at 700. After reviewing the expert witness report, the court agreed it did not comply with Fed. R. Civ. P. 26(a)(2)(B) because “[a]ll that the plaintiff has done is provide a series of documents with no attempt to relate the contents of those documents to this case [The report] contains no reference to the data which [the expert] will be utilizing and no suggestion as to any exhibits he might use to support his testimony.” *Id.* at 700-01.

Similarly, in *KW Plastics v. United States Can Co.*, 199 F.R.D. 687, 689 (M.D. Ala. 2000), the court agreed with the plaintiff that it had adequately shown prejudice because of its inability to examine and analyze the bases and reasons for one of the defendant’s expert witness opinions. *See* 199 F.R.D. at 690. In at least two points in his deposition, the defendant’s expert witness could not adequately recall or explain the basis for some of his calculations. In order to refute the expert’s opinions, the court held that the plaintiff “must have the information that supported his report. Such information is plainly relevant to [the plaintiff’s] motion to exclude [the expert’s] testimony.” 199 F.R.D. at 690-91; *see also Travelers Property & Cas. Corp. v. General Elec.*, 150 F. Supp. 2d 360, 365 (D. Conn. 2001) (describing as “woefully inadequate” a three-page expert report that provided little more than a “bare-bones” analysis and a very general overview of the expert’s investigation, results and conclusions; rather than a more thorough description of the data collected).

Again, in this case, Mr. Gilbert has represented Shook for years on the issues on which he intends to opine. His opinions necessarily are premised on his analysis and review of the information that Shook has provided to him over the years. This information, in other words, is central to what Mr. Gilbert has “considered” in reaching the opinions he intends to offer here.

is [*sic*] available and make a judgment as to what I need to look at.”). Travelers is therefore also entitled to see everything Mr. Shore reviewed in reaching the conclusions that he then passed on to Mr. Gilbert.

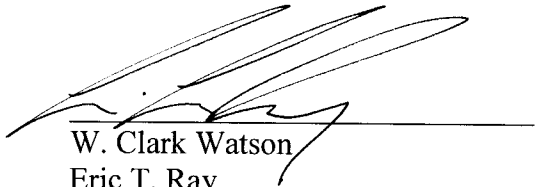
Thus, the plain language of Fed. R. Civ. P. 26 leaves no doubt that Mr. Gilbert must produce all such information to Travelers.⁴

CONCLUSION

WHEREFORE, Travelers respectfully requests that this Court enter an Order compelling Mr. Gilbert to produce fully and completely (i) all contingency fee agreements that either he or GHR has made in cases in which asbestos nonproducts issues are at stake; (ii) records of all payments made by Shook to Mr. Gilbert's law firm; (iii) all coverage analyses by GHR regarding Shook, and all internal communications between GHR and Shook, on the coverage issues that are the subject of Mr. Gilbert's opinions; and (iv) all data that Mr. Gilbert has considered or will consider in formulating his expert opinion.

Dated: July 12, 2002

Respectfully submitted,



W. Clark Watson
Eric T. Ray
BALCH & BINGHAM, LLP
1901 Sixth Avenue North, Suite 2600
Birmingham, Alabama 35203-2628
Tel: (205) 251-8100
Fax: (205) 226-8799

-and-

⁴ Alabama courts will exclude an expert's proffered testimony when the requirements of Rule 26 are not strictly adhered to. *See, e.g., KW Plastics v. United States Can Co.*, 131 F.Supp.2d 1289, 1296 (M.D. Ala. 2001) (excluding an expert's unjust enrichment calculations because "[a]t no time prior to the court's order, or in any of [the expert's] earlier three reports, or in any of [the party's] earlier pleadings, did [the party] seek to quantify damages on an unjust enrichment basis. . . . To allow [the expert] to testify as to unjust enrichment when he has never shown any prior inclination for doing so, would reward [the party] for its misdeeds and countenance an end-run around the Federal Rules of Civil Procedure and the orders of the court."); *Williams v. Roberts*, 202 F.R.D. 294, 296 (M.D. Ala. 2001) (citing rule and excluding testimony from an undisclosed expert witness).

David J. Woll
Kenneth S. Ziman
SIMPSON THACHER & BARTLETT
425 Lexington Avenue
New York, New York 10017
Tel: (212) 455-2000
Fax: (212) 455-2502

Attorneys for Travelers Casualty and
Surety Company

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on

Counsel for the Debtor

Roger Frankel, Esq.
Richard H. Wyron, Esq.
Swidler, Berlin, Shereff, Friedman, LLP
3000 K Street, NW
Washington, DC 20007

Richard P. Carmody, Esq.
Lange, Simpson, Robinson & Somerville
2100 3rd Avenue North, Suite 1100
Birmingham, Alabama 35203

Futures Representative

R. Scott Williams, Esq.
Haskell, Slaughter, Young & Rediker
1200 AmSouth/Harbert Plaza
1901 6th Avenue North
Birmingham, Alabama 35203

Futures Representative's Counsel

Robert M. Fishman, Esq.
Shaw, Gussis, Fishman, Glantz & Wolfson
1144 West Fulton Street, Suite 200
Chicago, Illinois 60607

Asbestos Claimants' Committee

Bryan Blevins, Esq.
Provost & Umphrey Law Firm
490 Park Street
P.O. Box 4905
Beaumont, Texas 77704

James L. Ferraro, Esq.
Kelly & Ferraro
1300 East Ninth Street, Suite 1901
Cleveland, Ohio 44114

Alwyn H. Luckey, Esq.
Cara M. Johnson, Esq.
P.O. Box 724
2016 Bienville Boulevard
Ocean Springs, Mississippi 39566

David O. McCormick, Esq.
Cumbest, Cumbest, Hunter & McCormick
P.O. Drawer 1287
707 Watts Avenue
Pascagoula, Mississippi 39568

Joseph F. Rice, Esq.
Ness Motley
28 Bridgeside Boulevard
Mount Pleasant, South Carolina 29465

Jeffrey Varas, Esq.
Varas & Moran
119 Caldwell Drive
Hazlehurst, Mississippi 39083

David Anderson, Esq.
Walston, Wells, Anderson & Bains
505 20th Street North, Suite 500
Birmingham, Alabama 35203

Bankruptcy Administrator

J. Thomas Corbett, Esq.
Office of the Bankruptcy Administrator
United States Bankruptcy Court
1800 5th Avenue North
Birmingham, Alabama 35203

Counsel for SouthTrust Bank

David S. Maxey, Esq.
Spain & Gillon
The Zinzer Building
2117 2nd Avenue North
Birmingham, Alabama 35203

Counsel for AmSouth Bank

John Kerring, Loan Officer
AmSouth Bank of Alabama
Main Office Birmingham
1900 5th Avenue North
Birmingham, Alabama 35203

Eric V. Helmers, Esq.
Assistant General Counsel
AmSouth Law Department - Nashville
721 AmSouth Center
Nashville, Tennessee 37237

Counsel for Shook & Fletcher Supply Co.

Donald M. Wright, Esq.
Sirote & Permutt
2311 Highland Avenue South
Birmingham, Alabama 35205

Counsel for Shareholders

John P. Whittington, Esq.
Lloyd C. Peeples, III, Esq.
Bradley, Arant, Rose & White
2001 Park Place, Suite 1400
Birmingham, Alabama 35203

Counsel for Hartford Insurance Co.

William J. Bowman, Esq.
Hogan & Hartson
555 13th Street NW
Washington, DC 20004

Counsel for Ranger Insurance Company

John F. O'Connor, Esq.
Harry Lee, Esq.
Steptoe & Johnson
1330 Connecticut Avenue NW
Washington, DC 20036

Counsel for CCR

William R. Hanlon, Esq.
Franklin D. Kramer, Esq.
Shea & Gardner
1800 Massachusetts Avenue NW
Washington, DC 20036

Michael P. Richman
Mayer, Brown, Rowe & May
1675 Broadway
New York, New York 10019

Counsel for Hasbrouck Haynes, Jr.

Robert B. Rubin, Esq.
Derek F. Meek, Esq.
Burr & Forman
Suite 3100
420 North 20th Street
Birmingham, Alabama 35203


Counsel for William Ray

Charles L. Denaburg, Esq.
2125 Morris Avenue
Birmingham, Alabama 35203

Counsel for Uniroyal, Inc.

Matthew A. Hamermesh, Esq.
Hangley, Aronchick Segal & Pudlin
One Logan Square, 27th Floor
Philadelphia, PA 19103

by facsimile without exhibit, by federal express including exhibit and/or by hand delivery on this
the 12 day of July, 2002.



OF COUNSEL

EXHIBIT “A”

1 APPEARANCES:

2 On behalf of Shook & Fletcher Insulation Co.:

3 JAYNE CONROY, ESQUIRE
4 PAUL J. HANLY, JR., ESQUIRE
5 Gilbert Heintz & Randolph
6 415 Madison Avenue
7 New York, New York 10017-1111
8 (212) 401-76009 JONATHAN P. GUY, ESQUIRE
10 ROGER FRANKEL, ESQUIRE
11 Swidler Berlin Shereff Friedman, LLP
12 3000 K Street, NW., Suite 300
13 Washington, D.C. 20007-5116
14 (202) 424-762315 On behalf of Travelers Casualty and Surety
16 Company:17 JAMES E. ROCAP, III, ESQUIRE
18 CHRIS STIDVENT, ESQUIRE
19 Baker Botts, LLP
20 The Warner
21 1299 Pennsylvania Avenue
22 Washington, D.C. 20004-2400
(202) 639-7716

On behalf of Scott Williams:

ROBERT M. FISHMAN, ESQUIRE
Shaw Guissis Fishman Glantz & Wolfson, LLC
1144 West Fulton Street, Suite 200
Chicago, Illinois 60607
(312) 541-0151

ALSO PRESENT:

Melissa Castro, Esquire
Richard D. Shore, Esquire

* * * * *

BETA REPORTING

(202) 638-2400

1-800-522-2382

(703) 684-2382

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

C O N T E N T S

3

EXAMINATION BY:

PAGE

Counsel for Travelers Casualty
and Surety Company

4

Question on page 81, line 6; page 85, line 1
marked per request.

GILBERT DEPOSITION EXHIBITS:

No. 1 - Report of Scott D. Gilbert

4

No. 2 - Agreement

29

No. 3 - December 23, 1998, Letter,
Gilbert to Killion

42

No. 4 - July 20, 2000, Letter,
Gilbert to Killion

48

No. 5 - January 29, 2001, Letter,
Gilbert to Killion

62

No. 6 - March 21, 2002, Letter,
Gilbert to Killion

65

No. 7 - November 16, 2001, Letter,
Gilbert to Killion

73

No. 8 - Schedules of Insurance

165

* * * * *

1 with that caveat, no.

2 Q So there's no summaries, no
3 exhibits of any kind that you plan to use?

4 A Other than the materials
5 referenced in the report.

6 Q Now, the second thing is the rule
7 requires a list of all publications authored
8 in the preceding ten years and I did not see
9 that in the report. The question is do you
10 have one? Do you have that?

11 A I write very little in terms of
12 publications which is why I'm not an
13 academic. I can try to find out whether
14 I've actually published anything in the last
15 ten years, but the likelihood is small.

16 Q Well, if you could undertake to
17 review and give us a list of all your
18 publications and copies of them if you have
19 them.

20 A You're not interested in creative
21 writing? I take that as a no.

22 Q Pardon?

7

1 A I take that as a no.

2 Q Oh, that we're not interested in
3 creative writing?

4 A That's right.

5 Q Depends on what you define as
6 creative writing. We are interested in all
7 of your publications creative or otherwise.

8 A You're in a good mood today. Go
9 ahead. That wasn't a compliment.

10 Q Another item in the rule that's
11 required is a listing of all cases in which
12 you have testified either at trial or by
13 deposition in the last four years I believe
14 and that was not in the report. So, first
15 of all, I would ask that you provide that in
16 writing within the next two or three
17 business days and, second, if you could just
18 list for me now what you remember in terms
19 of either deposition or trial testimony that
20 you have given in various cases, I would
21 appreciate it.

22 A Within the last four years?

BETA REPORTING

(202) 638-2400

1-800-522-2382

(703) 684-2382

1 Q Was it transcribed?

2 A Yes.

3 Q Do you remember the issues?

4 A Vaguely.

5 Q What's your vague recollection?

6 A It involved -- it was an ADR
7 between Porter Hayden and Wausau and it
8 involved the settlement by Porter Hayden
9 with Wellington nonsignatory insurers and
10 the application of those settlements, the
11 reasonableness of those settlements and then
12 a dispute as to who owed whom what dollars
13 between Porter Hayden and Wausau under the
14 Wellington Agreement with respect to
15 nonsignatory payments.

16 Q Did the issue of number of
17 occurrences present itself in that case?

18 A Not that I recall.

19 Q What about the issue of
20 nonproducts coverage?

21 A No, other than it was accepted,
22 but -- well, let me step back. Nonproducts

1 coverage was an issue. I didn't testify
2 about nonproducts one way or the other.

3 Q Do you have a copy of the
4 transcript of your testimony there?

5 A Probably.

6 Q I would ask for a copy of that,
7 please. In the Thorpe ADR was this in the
8 trial phase?

9 A Yes.

10 Q Before Judge Sofaer?

11 A No, I forget who the judge was.

12 Q Which Thorpe ADR are we talking
13 about?

14 A It was -- the Thorpe ADR was
15 Liberty Mutual concerning nonproducts.

16 Q You're not referring to Thurston,
17 are you?

18 A I'm sorry. I didn't mean Thorpe.
19 Thurston. I apologize.

20 Q That was Judge Cowan?

21 A Yes.

22 Q Did you provide deposition

1 testimony in that case?

2 A Not to my recollection.

3 Q Did you provide trial testimony in
4 that case?

5 A Yes.

6 Q Was it transcribed?

7 A I don't remember.

8 Q Well, again, we'd ask that you go
9 ahead and search for that and produce it.
10 Early next week would be fine.

11 In Wallace & Gale you said that
12 you submitted a report. Was that filed with
13 the court?

14 A Yes.

15 Q Do you have a copy of that?

16 A Yes.

17 Q If you would provide that to us
18 early next week, I'd appreciate it. Were
19 you deposed in that case?

20 A Yes.

21 Q Do you have a copy of your
22 transcript of your deposition?

1 A I don't know.

2 Q Do you remember what the issues
3 were in Wallace & Gale that you were deposed
4 on?

5 A Yes.

6 Q What were they?

7 A One issue was control of the
8 underlying cases by the primary carrier,
9 which was Travelers in that case, pursuant
10 to a claims handling agreement that they had
11 with Wallace & Gale. Another issue was
12 trigger of coverage under Maryland law,
13 another issue was allocation under Maryland
14 law, a major issue was the definition of
15 nonproducts claims, the issue of number of
16 occurrences, many of the issues -- all of
17 the nonproducts issues that would be
18 involved in the -- the Shook case
19 ultimately.

20 Q In Wallace & Gale, that was a
21 proceeding before or in the Federal District
22 Court; is that right?

1 A That was bankruptcy court.

2 Q Bankruptcy court. Do you remember
3 who the judge was in that?

4 A No recollection whatsoever.

5 Q Was this a different proceeding
6 than the decision by Judge Messite?

7 A Yes.

8 Q Are you familiar with what I'm
9 referring to when I talk about the
10 proceeding that Judge Messite presided over?

11 A Yes.

12 Q That also involved Wallace & Gale,
13 right?

14 A Yes.

15 Q You were representing certain
16 individuals as intervenors in that case?

17 A On certain issues, yes.

18 Q Did you provide any testimony in
19 connection with that proceeding?

20 A No.

21 Q In the bankruptcy proceeding were
22 you proffered as an expert witness to the

1 court?

2 A Yes.

3 Q Did the court accept you as an
4 expert witness?

5 A As I mentioned, about two or three
6 minutes before I was to come up and be
7 examined by the court Travelers withdrew its
8 plan and so the controversy was mooted.

9 Q So the court did not have an
10 opportunity to make a decision on whether
11 you should be an expert witness or not; is
12 that --

13 A You'd have to go back and look at
14 the transcript. I don't remember.

15 Q Did I ask you whether you had a
16 copy of that transcript?

17 A No.

18 Q Do you?

19 A I -- I don't know. I can find
20 out.

21 Q Could you look for it and produce
22 it?

1 A We'll look for all those things
2 and find it.

3 Q Early on next week. Can you think
4 of anything else in which you have either
5 been deposed or provided testimony by
6 affidavit or report or otherwise in the last
7 four years?

8 A I provided testimony but not as an
9 expert.

10 Q Any reports or affidavits as an
11 expert?

12 A I can't remember any others, but
13 we'll check the files. If there are any,
14 we'll provide you with whatever materials we
15 have.

16 Q Let's turn to this particular
17 proceeding. Who asked you to appear as an
18 expert witness?

19 A It would have been either Richard
20 Shore, Roger Frankel or Jayne Conroy or a
21 combination of the three.

22 Q Do you remember the discussions.

1 A Yes, it was one of the counsel for
2 Shook, either insurance counsel or
3 bankruptcy counsel.

4 Q Now, Mr. Shore is your partner; is
5 that right.

6 A Yes.

7 Q Gilbert Heintz & Randolph actually
8 represented Shook in this proceeding; is
9 that right?

10 A Yes. Well, when you say "in this
11 proceeding," which proceeding are you
12 referring to?

13 Q The bankruptcy proceeding.

14 A We're special counsel, yes.

15 Q Ms. Conroy is with the firm of
16 Hanly & Conroy?

17 A She's with the firm Hanly &
18 Conroy. She is also counsel to Gilbert
19 Heintz & Randolph.

20 Q Is she also counsel to Shook in
21 this case?

22 A Yes.

1 if it had merit to it, is miniscule in
2 comparison to Travelers' actual liability in
3 this case and with that in mind discussed
4 the different subjects that I might be
5 prepared to testify about. This report was
6 then prepared on the basis of those
7 discussions.

8 Q Who prepared the report?

9 A I believe that Ms. Conroy had
10 input into it, Richard Shore had input into
11 it, I don't know if other individuals edited
12 it or not. I had input into it and reviewed
13 it and was comfortable with it and signed
14 it.

15 Q Who was the principal drafter?

16 A I don't know. At our firm people
17 do things and they give them to me and I
18 review them and if I'm comfortable with
19 them, I sign them.

20 Q You were not the principal
21 drafter?

22 A No.

1 Q Did you make any edits in the
2 report?

3 A I'm sure I did.

4 Q Do you have copies of the edits
5 that you made?

6 A I'm sure I don't.

7 Q What is your general practice with
8 respect to drafts?

9 A Throw them away.

10 Q Are you sure that you have not
11 retained any drafts of the report?

12 A I'm relatively sure. I'm happy to
13 check and if we retained any, I'd be happy
14 to provide them to you but it's highly
15 unlikely.

16 Q Well, take that as a request of
17 doing just that and I appreciate your
18 getting back to us on that as soon as you
19 can next week.

20 A I took out all of the expletives.

21 Q Did you discuss with either
22 Mr. Shore or Ms. Conroy the purpose of your

1 particularly if he's relying upon them.

2 MS. CONROY: That may clear up a
3 lot.

4 MR. ROCAP: Yes. You would be
5 surprised.

6 THE WITNESS: Can we go off the
7 record for a second?

8 MR. ROCAP: Sure.

9 (Discussion off the record)

10 BY MR. ROCAP:

11 Q Approximately how many hours did
12 you spend in preparing your opinions in this
13 case?

14 A How many hours are there in 22
15 years? I couldn't multiply that high. Most
16 recently probably six to eight hours.

17 Q Okay.

18 A That's the difference between an
19 expert and an advocate.

20 Q Now, you are, as I mentioned
21 before or asked you before and you verified
22 that Gilbert Heintz is, in fact,

1 representing Shook in this case?

2 A Yes.

3 Q Gilbert Heintz has represented
4 Shook since the formation of Gilbert Heintz;
5 isn't that right?

6 A Yes.

7 Q When was Gilbert Heintz & Randolph
8 formed?

9 A January 1, 2001.

10 Q Since January 1, 2001 how much
11 money has Gilbert Heintz been paid in
12 connection with its representation of Shook?

13 A I have no idea.

14 Q Do you have an approximate number
15 in mind?

16 A No.

17 Q Is it hundreds of thousands of
18 dollars?

19 A I don't know.

20 Q Is there a way to find that out?

21 A Certainly.

22 Q Your firm records has that?

1 A Yes.

2 Q I would ask that that be produced
3 early next week as well, please.

4 MS. CONROY: I'll take it under
5 advisement.

6 MR. ROCAP: We are entitled to
7 that information, so I'll just ask that it
8 be produced next week. If you're not going
9 to produce it, let me know as soon as
10 possible so we can file a Motion To Compel.

11 THE WITNESS: Such weird foreplay
12 here. Sorry.

13 MR. ROCAP: We can really -- never
14 mind.

15 MS. CONROY: Thank you.

16 MR. ROCAP: We're off the record.

17 (Discussion off the record)

18 BY MR. ROCAP:

19 Q Now, you have an agreement with
20 Shook with respect to your fees in this
21 case; is that right?

22 A Yes.

1 Q That agreement provides for a
2 contingency fee; is that right?

3 A Yes.

4 Q Actually before we go to the
5 contingency fee agreement let me back up a
6 minute.

7 Prior to January 1 of 2001 was
8 Shook represented by Dickstein Shapiro Morin
9 & Oshinsky?

10 A Yes.

11 Q You were a partner in that firm at
12 that time?

13 A Yes.

14 Q Did you and Mr. Shore provide
15 services to them in connection with their
16 insurance coverage issues?

17 A By that you mean Shook?

18 Q Yes.

19 A Yes.

20 Q Do you remember how much Dickstein
21 Shapiro Morin & Oshinsky was paid?

22 A No.

1 expert.

2 THE WITNESS: Just going to give
3 you a hint, don't take it under contingency.

4 BY MR. ROCAP:

5 Q Have you had a chance to look at
6 Exhibit 5?

7 A Yes.

8 Q What is this document?

9 A This is our first engagement
10 letter with Shook & Fletcher from Gilbert
11 Heintz & Randolph in January of 2001.

12 Q For the record it's RSW 346
13 through 352. In this particular agreement
14 you were agreeing to provide services on an
15 hourly rate basis as opposed to a
16 contingency fee basis; is that right?

17 A That's correct.

18 Q That was with respect to the
19 Wellington nonproducts ADR proceeding as
20 well as certain other matters that are set
21 forth in the second paragraph of the
22 January 29th letter?

1 A Correct.

2 Q Now, was this agreement ever
3 modified?

4 A Yes.

5 Q When was that?

6 A I don't remember the precise date,
7 but I'm sure you have a copy.

8 Q Do you remember how much,
9 approximately, you received in fees pursuant
10 to the January 29th, 2001 agreement?

11 A No.

12 MR. ROCAP: I think that's
13 encompassed within our prior request, but in
14 any event, we would like that information,
15 please. Let's have this marked as
16 Exhibit 6, please.

17 (Gilbert Deposition Exhibit
18 No. 6 was marked for
19 identification.)

20 THE WITNESS: I think it was in
21 March, Jim.

22 BY MR. ROCAP:

1 Q God, you're smart. That's why you
2 are where are you.

3 For the record, Exhibit 6 appears
4 to be a copy of a March 21, 2002 letter from
5 Mr. Gilbert to Dr. Killion, Junior. Is
6 that, in fact, what it is, Scott?

7 A Yes.

8 Q This is an agreement that amended
9 the January 29th, 2001 agreement?

10 A Yes.

11 Q Were there any intervening
12 amendments to the January 29, 2001
13 agreement?

14 A I don't believe so.

15 Q Exhibit 6, the March 21, 2002
16 agreement, that is the agreement that sets
17 in place the contingency fee arrangement
18 that we talked about earlier?

19 A Yes.

20 Q Now, look, if you will, at
21 paragraph --

22 A Actually let me correct my

1 statement because we reference the
2 November 16, 2001 letter in here.

3 Q I have that and we'll talk about
4 that in just a minute. Look at paragraph
5 C.1 on page two.

6 A Yes.

7 Q It's entitled, "Contingency Fee,"
8 and it provides that Gilbert Heintz &
9 Randolph will receive as fees for its
10 professional services in connection with the
11 matters set forth above, 15 percent of any
12 and all insurance proceeds recovered,
13 secured or otherwise made available from or
14 on behalf of the insurers involved. Do you
15 see that?

16 A Yes.

17 Q Now, the paragraph goes on to say,
18 "Any such fees shall be payable at the time
19 of final settlement or judgment with respect
20 to the insurer involved regardless whether
21 the insurance proceeds in question are
22 payable immediately or over time or on a

1 lump sum or a claim-by-claim basis or
2 otherwise, but any such fees shall be
3 payable solely from the insurance proceeds
4 in question or from other insurance proceeds
5 received by or with respect to Shook and not
6 from other assets of Shook." Do you see
7 that?

8 A Yes.

9 Q Now, does that mean that if you
10 enter into a settlement agreement with
11 Travelers for a hundred million dollars --

12 A Can we pick a better hypothetical?

13 Q I could go back to 50.

14 A Let's be realistic. It's long
15 gone, Jim.

16 Q Because my math is not very good,
17 a hundred is a nice number.

18 A If we think of the good old days,
19 you could have gone back to 150. Go ahead.

20 Q Your contingency on a hundred
21 million dollar settlement would be 15
22 million; is that right?

identification.)

74

BY MR. ROCAP:

Q Back on the record. I've handed you what has been marked as Gilbert Exhibit Number 7, which is Bates numbered RSW 354 through 359, and you have a -- what's the last page of your --

MS. CONROY: We don't have Bates stamp, but it looks like page four is the last page.

BY MR. ROCAP:

Q Oh, okay. Good. Yeah, the copy I got for the deposition was taken from the application to retain Gilbert Heintz, so it does not have Bates numbers, but I believe it's a complete copy of one of the attachments to that application. Could you tell me what this document is?

A This is the November 16th, 2001 engagement letter with Shook & Fletcher concerning the negotiation of the prepackaged bankruptcy.

1 Q Pursuant to this agreement Gilbert
2 Heintz will receive a fee of \$1 million in
3 connection with those services?

4 A Yes.

5 Q Now, look at page two --

6 A That -- let me just clarify the
7 fee was for our services and the services of
8 Mike Rooney & Company.

9 Q That's what I was going to ask
10 you. On page two it mentions that Gilbert
11 Heintz will pay MFR's fees from
12 September 1, 2000 forward from the flat fee
13 received by Gilbert Heintz?

14 A Yes.

15 Q What is the fee that is being paid
16 to Mr. Rooney?

17 A We haven't determined the fee from
18 the second payment yet. The first
19 payment -- I'm trying to remember, Jim. It
20 was either 50 or a hundred thousand dollars.
21 I think it was \$50,000.

22 Q What are the services that

1 A No, my understanding is in
2 bankruptcy that you cannot do that without
3 full disclosure to the court in any event.
4 We have no intention of doing so.

5 Q With respect to the contingency
6 fee agreement that was set forth in
7 Exhibit 6, which is the March 21st, 2002
8 agreement, does Gilbert Heintz have any
9 obligation to share any portion of that fee
10 with any third party?

11 A No.

12 Q With respect to any other amounts
13 that have been received from Shook, that
14 Gilbert Heintz received from Shook, did it,
15 in fact, share any of those fees with any
16 third party?

17 A Other than MFR, no.

18 Q Do you have any, you being Gilbert
19 Heintz, do you have any obligation to make
20 any payments of any kind to Joe Rice, Ness
21 Motley, or any other member of the asbestos
22 claimants' counsel in this case?

1 A Absolutely not.

2 Q Do you have any financial
3 arrangement with Joe Rice, Ness Motley or
4 any other member of the asbestos claimants'
5 counsel to share fees received in any other
6 case?

7 A To any other plaintiffs' counsel.
8 We have -- we are co-counsel with Weitz &
9 Luxenberg in some insurance matters in New
10 York unrelated to this, we are co-counsel
11 with Baron & Budd in a matter involving our
12 Arco, Babcock and Wilcox insurance, which is
13 not yet in a contingency fee mode, but I
14 expect it will be. We are not co-counsel
15 with Ness Motley at this time on any
16 insurance matters. We are co-counsel with
17 Peter Angelos in the case you mentioned,
18 Wallace & Gale, but that's hourly billing.
19 I think at present that sums up the
20 relationships.

21 Q Well, let's go back to the Weitz &
22 Luxenberg. You said you were co-counsel

1 with them; is that right?

2 A Yes.

3 Q What are the services you are
4 providing, Gilbert Heintz is providing in
5 connection with that representation?

6 A We advise claimants and represent
7 claimants in coverage litigation with
8 respect to the application of insurance
9 policies to asbestos bodily injury claims.

10 Q Is there any particular litigation
11 that you were advising in that particular
12 relationship?

13 A In terms of public record matters,
14 we are representing claimants that are
15 involved in pursuing claims against the
16 Robert Keasbey Company in New York.

17 Q Any other public record matters?

18 A We are co-counsel with Weitz &
19 Luxenberg, no, no other public record
20 matters.

21 Q In the Keasbey matter is your fee
22 arrangement a contingency fee arrangement?

1 A Yes.

2 Q Does that matter involve the
3 nonproducts issue that is also presented in
4 this case?

5 A Yes.

6 Q If there were a decision on a
7 nonproducts issue in this case that is
8 consistent with your opinion in this case,
9 would that be a useful precedent in the
10 Keasbey matter?

11 MR. FISHMAN: When you say "this
12 case," what case are you talking about?

13 MR. ROCAP: The Shook case.

14 MR. FISHMAN: The bankruptcy case?

15 THE WITNESS: The insurance case?

16 MR. ROCAP: Well, we'll talk about
17 the insurance coverage case.

18 THE WITNESS: I think all positive
19 precedents in insurance are useful. I don't
20 know that I would say that Shook would be
21 more usefuler than a number of cases that
22 are pending or have been decided, but would

1 a positive outcome in Shook benefit our
2 efforts there in any other case or any other
3 policyholder, sure.

4 BY MR. ROCAP:

5 Q What is your contingency fee
6 arrangement in Keasbey?*

7 A It's confidential.

8 Q Is it a percentage of recovery
9 contingency fee?

10 A Percentage contingency fee.

11 Q You're refusing to provide any
12 further information on that?

13 A That's correct.

14 Q Could you just mark the record
15 there for purposes of a Motion To Compel.

16 With respect to Baron & Budd, what
17 is your current arrangement with Baron &
18 Budd for fees?

19 A We're paid by the hour.

20 Q What services are you providing to
21 Baron & Budd?

22 A We're advising Baron & Budd with

1 basis there?

2 A By the Angelos firm, yes.

3 Q Have there been any discussions
4 about moving to a contingency fee basis
5 there?

6 A Not serious discussions, no.

7 Q But it has been mentioned as a
8 possibility?

9 A We always mention it as a
10 possibility.

11 Q Have you been told under no
12 circumstances will a contingency fee be
13 appropriate?

14 A No.

15 Q So it is a possibility in the
16 Angelos matter that you could end up with a
17 contingency fee arrangement; is that right?

18 A It's possibility anywhere. It's
19 highly unlikely.

20 Q Are there any other cases in which
21 you are representing any asbestos claimant
22 or their counsel in which the nonproducts

1 issue presents itself and in which you have
2 a contingency fee arrangement?

3 A No, maybe the only other one which
4 is -- represents Celotex trust, is there is
5 a contingency element to our agreement with
6 the Celotex trust that can be triggered upon
7 the happening of certain events. If you
8 consider the trust a trust with a benefit of
9 the claimants, that could fall within your
10 question, but other than that at this time I
11 think that's it.

12 Q With respect to the Celotex trust,
13 is it again correct to say that a favorable
14 decision here on the nonproducts issue
15 favorable to Shook, would be of benefit in
16 the Celotex ADR?

17 A As I answered before, I think any
18 favorable decision of the policyholder is
19 beneficial in other matters involving
20 similar issues.

21 Q What is your contingency fee
22 arrangement with respect to the Celotex

1 trust matter?*

2 A That's something I'm not
3 comfortable disclosing without the consent
4 of the trustees.

5 Q Well, number one, mark the
6 transcript but, two, we'd ask that you talk
7 with the trustees and ask them for
8 permission to disclose that because we will
9 move to compel in any event if they don't
10 agree.

11 A Remember that carrier in the ADR
12 who hasn't paid you, well, they would like
13 you to provide this to them, no big deal. I
14 can predict their answer.

15 Q In one of your prior answers when
16 I asked you what you were bringing to task
17 at trying to educate the court you mentioned
18 that you had more of an established
19 relationship with the plaintiffs' asbestos
20 bar than any other single lawyer in the
21 insurance area, what did you mean when you
22 said "established relationship"?

1 A We represent claimants in matters
2 I've described to you already represent, we
3 represent the claimants in the Babcock and
4 Wilcox bankruptcy, represent claimants in
5 Burns & Roe, represent the claimants in
6 Kentile and in those contexts we deal very
7 closely with their counsel, who obviously
8 are the counsel who are dealing with the
9 underlying liability while we deal with the
10 insurance issues. In the course of that I
11 have established, as I do with clients and
12 adversaries, personal relationships, as well
13 as very strong professional relationships.

14 Q Is one of those relationships with
15 Mr. Rice?

16 A Yes.

17 Q In the Burns & Roe matter you said
18 you are representing claimants in that
19 matter?

20 A Claimants' committee, yes.

21 Q That is an asbestos bankruptcy?
22 Kentile is an asbestos bankruptcy?

1 A Yeah, it's -- Kentile is in bit of
2 a limbo phase before Judge Lifland, but,
3 yes.

4 Q With respect to either one of
5 those representations, do you have any kind
6 of a contingency fee arrangement?

7 A No.

8 Q Has there been any discussion --

9 A Actually I shouldn't say no. I
10 don't remember what our fee is in Kentile.

11 Q Well, I would ask that you check
12 on that and let us know. Are you certain
13 with respect to Burns & Roe that it is not a
14 contingency?

15 A Burns & Roe is not a contingency.

16 Q Are you currently working with any
17 member of the plaintiffs' bar, plaintiffs'
18 asbestos bar right now on the development of
19 other prepackaged bankruptcies similar to
20 the Shook matter?

21 A Yes.

22 Q Can you describe which ones those

1 are?

2 A I can describe ACandS because it's
3 pretty much a matter of public record and
4 you're well aware of it and cannot describe
5 others because they're still being
6 negotiated.

7 Q How many others are there without
8 naming names?

9 A A couple.

10 Q In connection with each one of
11 those have you been having discussions with
12 the counsel with whom you were dealing about
13 your fee arrangement?

14 A Counsel with whom we were dealing.
15 You mean the client?

16 Q Who was your client in those,
17 without naming names what is the --

18 A Our client in ACandS obviously is
19 ACandS, our client in the other matters --
20 each of the other matters is the potential
21 debtor.

22 Q In either one of those instances

1 have you had any discussions with them about
2 your fee being a contingency fee
3 arrangement?

4 A We have had discussions about a
5 flat fee different amount, but a flat fee
6 for the prepackaged bankruptcy related
7 services, as was the case in Shook, and a
8 separate contingency fee on the insurance
9 matters.

10 Q Is that in all of those instances
11 that you've been having those discussions?

12 A Yes.

13 Q Is it a possibility that in each
14 one of those instances you will end up with
15 a contingency fee arrangement for the --
16 with respect to the recovery of insurance
17 proceeds?

18 A Yes.

19 Q In each one of those instances
20 does the nonproducts issue present itself?

21 A Yes.

22 Q In any of those instances has the

1 opinion?

2 A I'm relying on my understanding of
3 the Wellington Agreement and my
4 understanding from discussing this with
5 colleagues who were very familiar with
6 the -- the exposure periods of the Shook
7 claims, that a very, very, high percentage,
8 and I don't know the precise percentage, of
9 the claims would have an exposure period
10 under Wellington that overlaps with the
11 Travelers coverage.

12 Q When you say it's based on your
13 discussions with colleagues, what do you
14 mean?

15 A Richard Shore and others.

16 Q I see. So your opinion is based
17 upon Mr. Shore telling you that this is
18 correct?

19 MS. CONROY: Object to the form.

20 THE WITNESS: It's based upon
21 Mr. Shore's representations to me of what
22 he's seen from the CCR in the way of claim

1 information and data and what people have
2 looked at in terms of the potential exposure
3 of Travelers vis-a-vis the Wellington
4 triggers.

5 BY MR. ROCAP:

6 Q Have you looked at any of that
7 data?

8 A Not yet.

9 Q Do you plan to?

10 A Yes.

11 Q What data do you plan to look at?

12 A I will sit down with Mr. Shore and
13 determine where the data is most readily
14 available and take a look at it.

15 Q So you'll look at what Mr. Shore
16 asks you to look at?

17 A No, I will find out from Mr. Shore
18 what's is available and make a judgment as
19 to what I need to look at.

20 Q Again, we'd make a request that,
21 since that has not been done in connection
22 with the expert report, that we be told if

1 and when that determination has been made so
2 we can reopen the deposition.

3 You have not looked at any claim
4 files I take it in connection with this
5 opinion?

6 A Not yet.

7 Q Have you seen or looked at any
8 data runs from the CCR that contain
9 projections of Shook's liabilities?

10 A Not that I recall.

11 Q Have you seen or looked at any
12 data runs or any other information that
13 would inform your opinion with respect to
14 future claims?

15 A I've looked at Wellington in
16 connection with settlement negotiations with
17 Travelers, but I don't remember what they
18 were.

19 Q Is there any projection that
20 you're aware of as to the likely exposure
21 demographics for future claimants?

22 A Again, other than in the context

1 of what was done with respect to settlement
2 discussions, I'm not aware of any. We
3 presented those numbers to Travelers.

4 Q I see. Those are numbers that you
5 presented to Travelers?

6 A In the context of settlement
7 proposals.

8 Q I see.

9 A To explain why we were where we
10 were.

11 Q Okay.

12 A The little red-headed guy was
13 there.

14 Q The little red-bearded guy wasn't.

15 A You have red hair?

16 (Discussion off the record)

17 BY MR. ROCAP:

18 Q Does Shook have any projections
19 that show the exposure demographics, for
20 likely exposure demographics for future
21 claimants?

22 A You have to ask Shook. I don't

1 know.

2 Q Have you asked that question of
3 Shook?

4 A I have not personally, no.

5 Q So what is the basis for your
6 opinion as it's set forth in 7(a) with
7 respect to future claimants?

8 A My discussions with Mr. Shore, his
9 representations to me based upon the data
10 that he's reviewed.

11 Q Has he told you that he's reviewed
12 any data with respect to future claimants?

13 A I know that Mr. Shore put together
14 a brief analysis and I think maybe he used
15 consultants in doing that for purposes of
16 settlement with Travelers, which I referred
17 to already, and beyond that I don't know.

18 Q Did that relate to future
19 claimants?

20 A Yes. It was a really big number
21 if I remember.

22 Q If it came from Richard, I'm sure

1 it was.

2 A That's a cut from the red-headed
3 guy with gray body hair.

4 Q Do you intend to rely upon those
5 figures or that projection that Mr. Shore
6 informed you of in connection with your
7 opinion?

8 A Again, I'll have to take a look at
9 that and review the data upon which it is
10 based and then make a judgment.

11 Q I would like a copy of that
12 produced, please, early next week.

13 MS. CONROY: Or in the alternative
14 we'll just give you the Bates numbers. It
15 may have already been produced, too.

16 MR. ROCAP: I don't know precisely
17 what it is that Scott's referring to, but
18 whatever it is he's referring to, if you
19 would be kind enough to look for it and get
20 it produced early next week, I'd appreciate
21 it.

22 BY MR. ROCAP:

1 look at refractory companies. They had a
2 very tiny liability and once they were
3 targeted what happened with respect to that
4 liability. I think that's -- that's what
5 you need to look at when you look at the
6 future. It's not just a quantitative
7 analysis. It's not just, you know, a
8 statistician coming in to do an economic
9 study. It's bringing judgment to this based
10 upon the knowledge that one gains looking at
11 this again and again and again over 20 years
12 for dozens and dozens and dozens of
13 defendants.

14 Q I'm sorry. Are you done?

15 A Period.

16 Q Do you intend to rely upon any
17 statistical or economic study with respect
18 to the future claims?

19 A Unlikely.

20 Q Do you hold yourself out as a
21 statistical expert?

22 A Not at all. As I mentioned, Jim,

1 I think that the -- some of the analyses
2 that were done were done by people I would
3 consider to be competent in that area.

4 Q Those are the studies that we're
5 going to have produced I take it.

6 A That you requested.

7 Q Okay.

8 A But, again, my view is it is what
9 it is.

10 Q Now, let's look at the last two
11 sentences of 7(a).

12 A Yes.

13 Q Just read those to yourself, if
14 you will.

15 A Yes.

16 Q First of all, is that simply a
17 statement of your opinion as to the terms of
18 the Wellington Agreement?

19 A It's my opinion of the application
20 of the Wellington Agreement to these facts
21 and also to the different Wellington
22 carriers involved in this and the

1 Q Let's assume that the John Smith
2 claim alleged first exposure to asbestos
3 in 1979, after the policy period of
4 Travelers; is Travelers liable for that?

5 A No.

6 Q Is it liable for it under this
7 plan?

8 A We're going around and around on
9 this issue. To the extent that UNR applies
10 and dollars come in to a trust, they will
11 come in on the UNR basis, those dollars may
12 be used to pay this particular claimant. Is
13 Travelers liable under the plan for that
14 particular claim? I mean you decide what
15 that means.

16 Q Now, has Shook undertaken any
17 analysis of its operations or its past
18 claims that you are using or intend to use
19 in connection with your opinion that a
20 substantial percentage of these claims are
21 nonproducts claims?

22 A Other than the analyses involving

1 percentage of sales and -- versus -- in
2 terms of revenues percentage of sales versus
3 installation activity, other than an
4 analysis I believe was done with respect to
5 Ingalls that looks look at those issues in
6 particular, I'm not aware of any other
7 studies.

8 Q Have you provided those to
9 Travelers before?

10 A I don't know.

11 Q Well, we would make a request for
12 those studies and all documents relating to
13 them within the firm of Gilbert Heintz.

14 MS. CONROY: I believe you have
15 them, but we'll look.

16 MR. ROCAP: In addition I want to
17 make sure that my request is clear. I want
18 all internal memoranda that describe,
19 discuss, relate to those studies whether
20 they were previously privileged or work
21 product or not.

22 MS. CONROY: We'll look to see

1 what's even there, but I can't give you an
2 answer now, but we will produce --

3 MR. ROCAP: With respect to the
4 analyses themselves, if you could at least
5 identify to me what it is that we're talking
6 about so that if I have them, I don't need a
7 second copy of them, I would prefer you give
8 me a second copy, that will remove all doubt
9 as to whether I've got them or not. But in
10 addition to that, I do want all of the
11 related materials.

12 BY MR. ROCAP:

13 Q Have you done any analysis of the
14 prior deposition testimony of any or all of
15 the Shook witnesses with respect to the
16 extent of their operations, sales, and other
17 activities?

18 A No.

19 Q Are there any internal memoranda
20 that you have in your Shook files which
21 discuss or describe the deposition testimony
22 of those individuals?

1 for coverage block line, which is drawn
2 unilaterally by a producer.

3 Q Have you spoken with the person
4 who wrote that on behalf of Aetna?

5 A No.

6 Q Do you know whether Aetna wrote
7 that or whether someone from Shook wrote
8 that?

9 A I'm trying to remember, Jim. We
10 can go back and look at the correspondence.
11 I don't remember. I think it was -- I
12 thought it was from Aetna, but I don't
13 remember.

14 Q Have you or anyone at Gilbert
15 Heintz or any of Shook's lawyers, for that
16 matter, interviewed the people who were
17 involved in the preparation of Schedule D?

18 A I don't know.

19 Q Do you have any knowledge or
20 information that you're using in connection
21 with your opinion of the recollections of
22 the individuals involved from both insurer

1 and the insured side in the preparation of
2 Shook's Schedule D?

3 A No.

4 Q Describe for me all of the
5 documents that you have seen that relate to
6 this issue of whether there was a
7 mutually-agreed upon date.

8 A I think all that I've seen was the
9 Schedule D with the attachments. I thought
10 there were some carrier letters attached, as
11 well as Schedule D notes.

12 MR. ROCAP: What I would like to
13 get early next week as well is a copy of all
14 of the documents that he's seen that he's
15 using in connection with this opinion on
16 Schedule D.

17 BY MR. ROCAP:

18 Q Have you seen a Schedule D that
19 was actually signed by all of the insurers
20 and Shook?

21 A I think so.

22 MR. ROCAP: Let's have this marked

1 right?

2 A Not quite that strongly. I'm not
3 a bankruptcy expert. For example, when I
4 testified extensively in Dow Corning, the
5 bankruptcy judge felt that I had something
6 to offer because we talked about UNR for
7 hours. That will be up to the judge to
8 decide, I guess, in this case.

9 Q Did you mention Dow Corning
10 earlier?

11 A No, it's not asbestos.

12 Q I see. Well, I would --

13 A I think it may be in my witness
14 report.

15 MR. HANLY: It's in the --

16 MS. CONROY: It's in the first
17 paragraph.

18 BY MR. ROCAP:

19 Q Could we get the transcript of the
20 testimony?

21 A I'm not -- and the reason I didn't
22 list it is, A, I don't believe it was in the

1 last four years; and, B, it's not clear to
2 me to this day whether I was testifying as
3 an expert or a fact witness, although the
4 judge relied an awful lot of what I said in
5 his opinions and I testified, again,
6 collectively for days, which you could
7 believe based on how I'm going on in this
8 deposition.

9 Q But we would like the testimony in
10 Dow Corning on the UNR issue.

11 Have you testified in any other
12 matters as an expert on the UNR issue?

13 A I don't think so.

14 Q Is there any proceeding of any
15 kind which the judge has declined to hear
16 your testimony as an expert?

17 A I don't remember, frankly, in the
18 Pfizer interest ADR how my testimony was
19 offered with respect the to Section XX and
20 you were involved in that. I just don't
21 remember. There was a big brew-ha-ha about
22 it and testimony was limited and I don't

1 five-minute break. Let me just go through
2 here and see if there's anything I missed
3 and we can probably wrap it up.

4 (Recess)

5 BY MR. ROCAP:

6 Q Back on the record. In connection
7 with your opinions are you relying upon any
8 discussions or information that has been
9 provided to you by people from Shook,
10 officers of Shook either directly or
11 indirectly?

12 MS. CONROY: That's apart from the
13 deposition testimony he identified in
14 paragraph --

15 MR. ROCAP: Correct.

16 MS. CONROY: Is that how you mean
17 it?

18 MR. ROCAP: Yes.

19 THE WITNESS: I would say not
20 directly, you know, I'm sure that indirectly
21 input is contained in the various materials
22 or discussions I've referenced, but

1 otherwise no.

2 BY MR. ROCAP:

3 Q When you say "indirectly," how
4 would that information have flowed? Through
5 to Richard and then to you?

6 A Through Richard to me. To the
7 extent that the Shook people had input into
8 the documents involved in the case, I would
9 see those obviously. To the extent that
10 they had had input into some of the studies
11 I've referenced, I have exposure to that,
12 but that's the extent of it.

13 Q I think I've already asked for
14 certainly all of the related materials and
15 communications that gave rise to or informed
16 of the studies, so that would certainly
17 include anything that Scott just referred
18 to, and then I noticed on your privilege
19 log, which I enjoyed. I'm sure you haven't
20 seen it.

21 A I haven't seen it.

22 Q I've done these kinds of privilege

1 logs before, but only with the agreement of
2 the other side. But this is pretty
3 impressive to do on your own.

4 There is a, I'm not even going to
5 mark this as an exhibit, it's just your
6 privilege log. It's a one-page privilege
7 log. There's an item 12 on it that I've
8 highlighted here. It just says, "Report
9 undated, Gilbert Heintz & Randolph to Shook
10 & Fletcher, analysis of claims and coverage
11 prepared by counsel in anticipation of
12 litigation reflecting legal analysis, mental
13 impressions and advice to the client." Do
14 you see that?

15 A Yes.

16 Q Do you know what that refers to?

17 A I have no idea.

18 Q Do you have any idea when it was
19 prepared?

20 A No.

21 Q Who would have been involved in
22 the preparation of it?

1 A Richard Shore has been the primary
2 partner contact with Shook for years, so
3 Richard would know the answer to that.

4 MR. ROCAP: I'll ask now I want a
5 copy of the report particularly given
6 Scott's reliance upon his discussions with
7 Richard. That's all I have.

8 MR. FISHMAN: I don't have any
9 questions, but I'd be happy to hear a story
10 if you need to break out with one.

11 (Whereupon, at 3:34 p.m., the
12 deposition of SCOTT D. GILBERT
13 was adjourned.)

14 * * * * *

CERTIFICATE OF NOTARY PUBLIC
DISTRICT OF COLUMBIA

I, Shari R. Broussard, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn; that the foregoing transcript is true and accurate record of the testimony given by the said witness.

I further certify that I am not related to any of the parties to the action by blood or marriage and I am in no way interested in the outcome of this matter.

Shari R. Broussard

My Commission Expires:

July 14, 2005